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March 8, 2004

DOCKET ROOM

VIA HAND DELIVERY

Hon. Deborah Taylor Tate, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Generic Docket Addressing Rural Universal Service*
Docket No 00-00523

Dear Chairman Tate

Enclosed are the original and fourteen copies of BellSouth's *Reply in Opposition to the Briefs Filed on Behalf of the Rural Coalition of Small LECs and Cooperatives and the Consumer Advocate Division*. Copies of the enclosed are being provided to counsel of record.

Cordially

Joelle Phillips

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BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re *Generic Docket Addressing Rural Universal Service*

Docket No 00-00523

**BELLSOUTH'S REPLY IN OPPOSITION TO THE BRIEFS FILED ON BEHALF OF
THE RURAL COALITION OF SMALL LECS AND COOPERATIVES AND THE
CONSUMER ADVOCATE DIVISION**

BellSouth Telecommunications, Inc. ("BellSouth") files this *Brief in Opposition To the Briefs Filed on behalf of the Rural Coalition of Small LECs ("LECs") and Cooperatives and the Consumer Advocate Division ("Consumer Advocate" or "CAD")* and respectfully shows the Tennessee Regulatory Authority ("Authority" or "TRA") as follows:

I. NEITHER THE ICOS NOR THE CAD CITE ANY PORTION OF THE PCP AGREEMENT IN SUPPORT OF THEIR CONTENTION THAT THE PCP AGREEMENT APPLIES TO CMRS TRAFFIC.

The Primary Carrier Plan ("PCP") does not cover Commercial Mobile Radio Service ("CMRS") –originated traffic that transits BellSouth's network. During the course of this docket, BellSouth has demonstrated this: (1) by citing the language of the PCP (which plainly excludes this traffic); (2) by noting that the PCP predated third-party traffic such as CMRS traffic; (3) by noting that the FCC defines such traffic as "local" while the PCP applies only to "toll" traffic; and (4) by noting the PCPs in Tennessee (in contrast to some other BellSouth states) were never amended to add an annex dealing with CMRS-originated transit traffic. It is clear for all these reasons that the PCP –the contracts establishing the terms of the

"intraLATA toll arrangements" referenced in the TRA's December 29, 2000 *Initial Order of Hearing Officer for the Purpose of Addressing the Authority's Jurisdiction over IntraLATA Toll Settlement Agreements between BST and Independent Incumbent Local Exchange Carriers* (the "December 2000 Order") – has no application to the CMRS-originated traffic that transits BellSouth's network. It is equally clear, consequently, that the December 2000 Order has no application to such traffic.

What do the ICO and CAD briefs say about the actual language of the PCP? Nothing. Neither brief even cites the contract's language. What do those briefs say about the fact that the PCP predates – and does not contemplate – transit traffic or about the fact that it was never amended to include that traffic? Again, nothing. How do these briefs square their attempt to include CMRS-originated traffic in a "toll" arrangement with the FCC's clear treatment of this traffic as local? On this point, the briefs also offer nothing.

The ICOs simply want to extend the benefits they received from the December 2000 Order to traffic beyond the scope of that Order. There is no support for such a broad and distorted reading of the Order in either the ICO brief or the CAD's brief.

II. The Situation Facing the TRA in December, 2000 is Nothing Like the Situation Today.

The ICOs and the CAD ask the TRA to respond to the present situation by broadening a remedy that was fashioned by the TRA to address a very different situation. The TRA entered its 2000 Order in order to ensure that, during the

negotiation of a more updated PCP, the ICOs would not be without the source of revenue provided by the handling of intraLATA toll traffic.¹ The situation today is not analogous.

First, the ICOs now have a willing supplier of compensation for terminating the CMRS-originated traffic – namely, the CMRS providers. These carriers stand ready to enter into agreements with the ICOs, and they have made offers of interim compensation.

Second, BellSouth has also offered to provide interim compensation to the ICOs through May, 2004. Unless the ICOs delay the pending arbitration, the arbitration should be concluded by the time such an arrangement expires. The ICO demand – that they be paid 3.0 cents per minute until an agreement with the CMRS providers is implemented (whenever that occurs) would provide a significant incentive for the ICOs to delay the resolution of an agreement with the CMRS providers. Obviously, as long as the ICOs can continue to collect compensation from BellSouth, they will be less motivated to reach an agreement with the CMRS providers.²

The ICOs have options for compensation before them. Instead of taking these options, they attempt to suggest that some emergency exists in order to pressure the TRA to intervene and impose an obligation on BellSouth and/or the CMRS providers above and beyond the compensation offers on the table. The

¹ As noted in BellSouth's brief, BellSouth disagreed at the time with the 2000 Order. Additionally, BellSouth believes that the time may soon come when BellSouth must ask the TRA to permit termination of the PCP. The Order merely prohibited termination absent Authority action.

² As discussed below, 3.0 cents per minute is a rate that will, in all likelihood, far exceed the rate ultimately contained in the CMRS agreement, based on comparison to other ICO-CMRS agreements on file with the Authority. For this reason, the potential for incentive to delay the CMRS agreement is real.

ICOs, of course, hope to convince the TRA to impose a higher rate of compensation – for an open-ended period of time – than the offers before them. Comparison of the rate to agreements on file with the TRA demonstrates that the ICOs seek a rate that is out of line with the norm. For example, the Highland Telephone agreement with Cingular provides a rate of 1.5 cents for termination of local traffic between those carriers. Similarly, the TDS/Verizon agreement provides for a range of rates between .80 and .89 cents per minute.³

III. There Is No Legal Basis To Support The Argument That BellSouth's Past Payments Created A Contractual Obligation For Future Payments.

The real essence of the ICOs' argument is now what it has been all along – an assertion that BellSouth must have a legal obligation to pay the ICOs because BellSouth paid in the past. That is not a legal argument.

Obviously, a party's past action can create a question about why the party acted in that fashion. BellSouth recognized that its past payment could reasonably create an inquiry about why BellSouth made such payments. But that's all it creates: a reason to inquire. BellSouth has answered that inquiry – BellSouth paid in the past because, before Meet-Point Billing, there were not billing records for the ICOs to use. The pre-Meet-Point Billing situation was dealt with by BellSouth by paying the ICOs and recovering funds from the CMRS companies. As BellSouth explained, this situation changed with Meet-Point Billing.

³ Notably, these ICO-CMRS agreements were reached without BellSouth's involvement and these agreements specifically involve and provide for indirect interconnection using BellSouth tandem switch. These contracts provide concrete proof that the ICOs can make – and have made – arrangements with the CMRS providers using indirect interconnection without the involvement of BellSouth, either in the negotiation of these agreements or as a signatory to those agreements. See, for example, *Wireless Interconnection Agreement Between TDS Telecom and Verizon*, Docket No. 02-00973, approved by TRA Panel, Kyle, Jones, Tate, order issued November 13, 2002.

Even if BellSouth had not provided this explanation of its past payment, the argument that BellSouth made payments in the past is insufficient under Tennessee law to create a contractual obligation to pay in the future.

Under Tennessee law, an enforceable obligation to perform a task that cannot be completed in less than one year can only be created by a written agreement. T.C.A. § 29-2-101 (the Tennessee Statute of Frauds). Pursuant to this basic tenant of Tennessee law, the ICOs must produce a written contract requiring BellSouth to make payments for termination of CMRS-originated traffic in order to provide an obligation to do so. As noted above, the only written agreement identified in this case is the PCP – and it makes *no* reference to CMRS-originated traffic. In fact, as discussed in BellSouth's earlier filings, the definition of toll traffic covered by that agreement excludes CMRS-originated traffic.

In short, the ICOs' emphasis on past payment is not relevant as a matter of law.

IV. Conclusion

The PCP does not require BellSouth to pay the ICOs to terminate traffic that BellSouth does not originate. The CMRS carriers have consistently argued that BellSouth's continued payment undermines the negotiation between the ICOs and the CMRS carriers. Clearly, ordering BellSouth to pay the ICOs for this traffic gives the ICOs an incentive to delay the progress of the arbitration with the CMRS providers.⁴

⁴ The CMRS carriers could point to more than one example of ICO delays to drive this point home. Speaking on behalf of Verizon at the February 23, 2004 Status Conference in the arbitration, attorney Melvin Malone discussed the need to avoid further delay on the arbitrations and pointed out that

Respectfully submitted,

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the ICOs had indicated, in December of last year, their plan to file a procedural motion relating to BellSouth in that arbitration, but that they had yet to present such a motion – even though the statutory time limit had not been waived Transcript at 17-18 During that same Status Conference, the ICOs suggested mediation even though the ICOs had made no prior effort to mediate The ICOs have now filed their procedural motion to join BellSouth, a motion which also seeks dismissal of the arbitrations, in the alternative, if BellSouth is not joined Given this record, the CMRS providers' concerns about delay are well founded

CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2004, a copy of the foregoing document was served on the parties of record, via the method indicated:

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